STATE OF MICHIGAN

COURT OF APPEALS

DALE FREDERICK MIESKE, PATRICK RONALD McIVER and PATRICIA JO McIVER,	UNPUBLISHED July 31, 2012
Plaintiffs-Appellants,	
v	No. 304346 Bay Circuit Court
SECURA INSURANCE,	LC No. 10-003615-CK
Defendant-Appellee.	

Before: STEPHENS, P.J., and SAWYER and OWENS, JJ.

PER CURIAM.

Plaintiffs appeal from an order of the circuit court granting summary disposition to defendant under MCR 2.116(C)(10) (no genuine issue of material fact) on plaintiffs' claim for breach of an insurance contract. We affirm.

Plaintiff Dale Mieske and Plaintiff Patrick McIver were involved in an incident on the dance floor of a bar, Sportsmans Brew Pub, located in Bay County. Specifically, Mieske pushed McIver and McIver fell to the floor, striking his head. Thereafter, McIver and his wife, plaintiff Patricia McIver, filed suit against Mieske alleging assault and battery.[1] Mieske sought coverage, for both indemnification and defense, under two policies issued by defendant, a "Farmowners Protector Policy" issued to Mieske and a Commercial General Liability Policy, issued to Mieske, d/b/a Mieske Excavation. Defendant denied coverage under both policies. Mieske retained counsel and a settlement was reached on the day of trial, settling for the policy limits of $1,000,000, with an assignment of rights from Mieske to the McIvers. Thereafter, Mieske and the McIvers commenced the instant action.

Given the procedural posture of this case, we accept plaintiffs' version of the events in question. Specifically, Mieske testified in his deposition that McIver had grabbed him by the face. Miekse backed off and, when McIver came towards him a second time, Miekse pushed him in the chest to keep him away. This push resulted in McIver falling to floor and striking his

[1] The suit also included a dram shop claim against the bar, but that is not relevant here.

head. Miekse maintains that he never intended to assault or injure McIver, but was merely attempting to keep McIver away from him.

Defendant's basis for the denial of coverage differed under the two policies. With respect to both policies, defendant argued that there was no "occurrence" that would trigger coverage. Additionally, coverage under the Commercial General Liability Policy was denied because the incident did not arise out of the conduct of the insured business. The trial court granted summary disposition on both grounds. Because plaintiffs do not argue on appeal that the conclusion with respect to the commercial policy was erroneous, we conclude that plaintiffs are abandoning any argument that the trial court erred in granting summary disposition under that policy. We turn our focus, then, to whether there is any genuine issue of material fact regarding whether there was an "occurrence" under the Farmowners policy.[2]

The Farmowners policy provides as follows:

> **"Occurrence"** means an accident, including continued or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in:
>
> a. "*bodily injury*;" or
>
> b. "*property damage*".

Although the policy does not define the term "accident," in *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105; 595 NW2d 832 (1999), the Supreme Court interpreted a nearly identical definition of "occurrence" under a policy which also left the term "accident" undefined.

In *Frankenmuth*, the insureds sought coverage from fire damage caused by a fire they intentionally set in their clothing store. They maintained that they only intended to start a small smoky fire to damage clothing inventory so that they could collect casualty insurance. But the fire got out of control, damaging the building as well as nearby businesses. *Id.* at 107. This Court concluded that there could be coverage under a commercial casualty policy if the insureds did not intend to damage the property. *Id.* at 110-111. The Supreme Court reversed.

In its analysis, the Court recognized that intentional acts can nevertheless be an "accident" and, therefore, an "occurrence." In determining whether an intentional act can nevertheless be an "accident," the Court looked to Justice Griffin's opinion in *Auto Club Group Ins Co v Marzonie*, 447 Mich 624; 527 NW2d 760 (1994). In *Frankenmuth, supra* at 115-116, the Court, quoting from *Marzonie, supra* at 648-649, made the following observation:

> [A] determination must be made whether the consequences of the insured's intentional act

[2] We do note, however, that the analysis of the "occurrence" issue would be materially the same under both policies and we would reach the same result under both policies.

> "either were intended by the insured or reasonably should have been expected because of the direct risk of harm intentionally created by the insured's actions. When an insured acts intending to cause property damage or personal injury, liability coverage should be denied, irrespective of whether the resulting injury is different from the injury intended. Similarly, . . . when an insured's intentional actions create a direct risk of harm, there can be no liability coverage for *any* resulting damage or injury, despite the lack of any actual intent to damage or injure."

Accepting Mieske's claim that he intended to push McIver away, but not to injure him, would exclude this case from the first scenario recognized in *Frankenmuth/Marzonie*, where there was an intent to injure but which resulted in a different injury than that which was intended. But it does not exclude it from the second category, where the intentional acts create a direct risk of harm. It is undisputed the Mieske intentionally pushed McIver in the chest. Such a push carries the direct risk of the person being pushed falling to floor and striking his head.

Turning to the question whether there was a genuine issue of material fact regarding whether defendant had a duty to defend Mieske in the underlying action, we agree that it did not. It is true, as plaintiffs argue, that the duty to defend extends even to groundless suits if the allegations even arguably come within the policy coverage. *Protective Nat'l Ins Co of Omaha v City of Woodhaven*, 438 Mich 154, 159; 476 NW2d 374 (1991). But there is no duty to defend if the policy does not apply and the allegations do not even arguably come within the policy coverage. *Id.* at 159-160. Here, neither the claim pleaded in the complaint (assault and battery) nor the facts, as discussed above, even arguably come within policy coverage. Therefore, there was no duty to defend and the trial court properly granted summary disposition on this issue as well.

Finally, defendant argues that it was also entitled to summary disposition on an argument raised below, but not expressly addressed by the trial court, namely that the claim came within the intentional acts exclusion of the policy. While we do not necessarily disagree with defendant's argument, in light of our resolution of the issues above, we join the trial court in not expressly addressing this issue.

Affirmed. Defendant may tax costs.

/s/ Cynthia Diane Stephens
/s/ David H. Sawyer
/s/ Donald S. Owens